

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 TENNESSEE STUDENT :
4 ASSISTANCE CORPORATION, :
5 Petitioner :
6 v. : No. 02-1606
7 PAMELA L. HOOD. :
8 - - - - -X
9 Washington, D. C.
10 Monday, March 1, 2004
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:01 a.m.
14 APPEARANCES:
15 DARYL J. BRAND, ESQ., Associate Solicitor General,
16 Nashville, Tennessee; on behalf of the Petitioner.
17 LEONARD H. GERSON, ESQ., New York, New York; on behalf of
18 the Respondent.
19
20
21
22
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DARYL J. BRAND, ESQ.	
4	On behalf of the Petitioner	3
5	LEONARD H. GERSON, ESQ.	
6	On behalf of the Respondent	24
7	REBUTTAL ARGUMENT OF	
8	DARYL J. BRAND, ESQ.	
9	On behalf of the Petitioner	39
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 82 -- rather, 02-1606, Tennessee Student
Assistance Corporation v. Pamela Hood.

Mr. Brand.

ORAL ARGUMENT OF DARYL J. BRAND
ON BEHALF OF THE PETITIONER

MR. BRAND: Mr. Chief Justice, and may it please
the Court:

This Court's decisions recognize that even in
subject areas where Article I grants Congress complete and
exclusive authority to make laws, unconsenting States are
still immune from suits by private parties.

QUESTION: Well, let's talk a little bit about
the notion that's raised in one or more of the amicus
briefs, that a bankruptcy proceeding is akin to an in rem
proceeding or is an in rem proceeding, such as might be
the case in an admiralty suit where we would think the
State would be bound. Now, would you address that
argument, which I found possibly persuasive?

MR. BRAND: Certainly, Your Honor. We would
submit that there -- there is no authority from this Court
supporting the view that there is an in rem exception from
sovereign immunity in the bankruptcy context. The

1 argument instead is made by analogy, as Your Honor
2 referred, to the -- the admiralty case of Deep Sea
3 Research, but the Deep Sea Research case is limited to the
4 admiralty context. It's limited to the special aspects of
5 admiralty law that had developed over hundreds of years,
6 certainly 200 years of -- of our Nation's experience.

7 QUESTION: Well, why doesn't it fit in the
8 bankruptcy context too where the debtor's assets are
9 assembled in kind of an in rem proceeding and the
10 creditors share in it? It could have very unfortunate
11 consequences certainly if -- if your position were upheld.

12 MR. BRAND: Well, Your Honor, although there
13 certainly are in rem aspects to bankruptcy jurisdiction in
14 the context of dealing with the property of the estate
15 that is before the court and that is in the custody of the
16 court, bankruptcy jurisdiction also embraces other --
17 other aspects of in personam jurisdiction involving the
18 parties and -- and personal relationships.

19 QUESTION: Well, could we just stick with the in
20 rem for a moment? Suppose there's a \$100,000 on the usual
21 free-for-all because there are more -- the -- the debts
22 exceed that amount. The State gets notice. It decides
23 it's not going to appear. The bankrupt is -- is
24 discharged. At the very least, if the State then later
25 sues on the debt, is the -- can the discharge be set up as

1 a defense?

2 MR. BRAND: Well, Your Honor, there -- there is
3 authority from -- from the lower courts that -- that it
4 could in fact, and that in -- in that situation, the --
5 the State might be bound by a general discharge order.

6 QUESTION: Well, what -- what happened here was
7 something where -- where a summons was issued to the
8 State, wasn't it? It was -- the State didn't just remain
9 outside and do nothing.

10 MR. BRAND: Well, that's -- that's exactly
11 right, Your Honor, and it also is a situation in which the
12 State was not making a claim against the -- the property
13 of the bankrupt estate.

14 QUESTION: Yes. It's hard to think of a debt as
15 part of a res. I -- I can't quite --

16 MR. BRAND: And that --

17 QUESTION: -- get that.

18 And I understand, but just on the basic point of
19 whether or not just for a discharge of a debt, the State
20 can be bound, you say you think it might be plausible, but
21 the State would be bound by the judgment if it later sues
22 on the debt.

23 MR. BRAND: I don't want to concede that point,
24 Your Honor. I think there is authority certainly that
25 would -- that could support that, and there are decisions

1 from the -- from the circuit courts, particularly the
2 Fourth, the Fifth, and the Ninth, which have held that a
3 discharge order under those circumstances would be binding
4 against the State. But each of those courts has also
5 upheld sovereign immunity as a bar to a suit against a
6 State as the State asserts in this case.

7 QUESTION: But this is not a normal suit against
8 the State. This is a suit in which the debtor seeks
9 authority to get a discharge, isn't it?

10 MR. BRAND: That's right, Your Honor, except
11 that --

12 QUESTION: So the proceeding itself is to
13 determine whether or not she's entitled to a discharge on
14 the debt at issue.

15 MR. BRAND: Yes. She is -- she has already
16 received a bankruptcy discharge, a blanket discharge from
17 debt. This is a proceeding to determine if this
18 particular debt qualifies under that. And the way the
19 statute is written, the way -- the way Congress has set
20 this up is that the debt is presumptively
21 nondischargeable. It is an exception from discharge until
22 such point as the debtor establishes undue hardship, at
23 which point the debt would be absolved and she would --
24 she would, in effect, have a discharge. But again, the --
25 by -- by the nature of the way the --

1 QUESTION: If she -- if she prevails in that
2 disputed factual matter, then it will be just like any
3 other discharge case. If -- if the hearing goes forward
4 and she prevails as a matter of fact, then it would be
5 just like any other discharge case, wouldn't it?

6 MR. BRAND: No, it wouldn't, Your Honor. A
7 normal discharge case would essentially not involve at all
8 the adjudication of individual debts. The discharge is --

9 QUESTION: No. I'm saying if she prevails on
10 the disputed issues of fact, thereafter it would be just
11 like a normal discharge case.

12 MR. BRAND: It -- it -- yes, if I'm
13 understanding, Your Honor. Yes, she would have, in
14 effect, a discharge from that debt. Yes.

15 QUESTION: Moreover, the -- the fact that this
16 proceeding had to be brought against the State was purely
17 a result of congressional disposition. Congress could
18 have treated these debts to the State like all other
19 debts, in which case they would have been automatically
20 discharged.

21 MR. BRAND: That's exactly right, Your Honor.

22 QUESTION: So -- so that the -- the argument
23 that the bankruptcy -- the in rem nature of the bankruptcy
24 procedure gives -- gives her all the protection that the
25 Constitution at least requires, vis-a-vis the State, it

1 seems to me is a strong one. It's only because of the
2 statute that -- that this action had to be brought. If
3 Congress really wants to discharge her from debts to the
4 State, it could have done so by simply treating the State
5 like all other debtors.

6 MR. BRAND: I think that's exactly right, Your
7 Honor. The debt could be treated as a discharged debt, in
8 which case the State would certainly be bound by the
9 operation of that law, but that is not --

10 QUESTION: Isn't it -- isn't it odd that you are
11 objecting to this proceeding where, if Congress then said,
12 okay, we'll make it dischargeable, you will be worse off?
13 In other words, Congress is trying to ameliorate the
14 ordinary effect of the bankruptcy law to give the State an
15 advantage. And your argument is to the effect of,
16 Congress, you can treat us just like all the others, and
17 we'll be worse off than we are now, but once you give us
18 this favor, then you -- the -- the law is
19 unconstitutional. You can't give us a favor. That seems
20 to be the essence of your argument.

21 MR. BRAND: No, Your Honor. I -- I would submit
22 our argument -- our argument is not that the State is
23 immune from the effect of the statute that would allow
24 discharge upon showing of undue hardship. We would
25 recognize that that is -- that is an appropriate part of

1 the -- of the exercise of Congress' bankruptcy power.

2 Our issue is with the provisions which are there
3 by virtue of the nature of the way that -- that exception
4 is written and also by virtue of the bankruptcy rules that
5 require that it be raised in the form of an adversary
6 proceeding in which the State could be summoned into
7 court, in bankruptcy court, anywhere in the country.

8 MR. BRAND: Well, could it be adjudicated
9 without an adversary proceeding, just say the debtor comes
10 in and says, I'm giving notice to the State? If they want
11 to come in, they can, but it's not -- it's -- I'm not
12 going to call it or the statute doesn't call it a summons
13 and complaint, doesn't call it an adversary proceeding,
14 just a proceeding to establish the status of this
15 obligation.

16 MR. BRAND: Your Honor, I think as Justice
17 Scalia suggested, Congress could write a statute that
18 would make a student loan dischargeable, more or less by
19 operation of law, but we would submit that the way this
20 statute is written -- and again, if we look --

21 QUESTION: I'm not asking about making it
22 totally dischargeable, but Congress wants to achieve this
23 result and sensitive to your concern. So it says, fine,
24 we're going to make it nondischargeable unless the student
25 shows undue hardship, but because the State doesn't want

1 to receive a summons and complaint, we're going to do it
2 in a nonadversary proceeding. The student will establish
3 it to the satisfaction of the bankruptcy court or not, and
4 the State will be given notice but not a summons and
5 complaint. Would that be satisfactory?

6 MR. BRAND: Your Honor, I don't believe it
7 would. I think that in substance that would be
8 essentially the same as the adversary complaint that --
9 that we're talking about here. And -- and under -- under
10 Coeur d'Alene and -- and the discussion in other similar
11 cases, the question here can't turn on the mechanics of
12 the pleading or on the -- the style of the caption.

13 QUESTION: So you -- you would have no problem
14 with Congress' amending this statute so that it reads if
15 the State chooses to waive its sovereign immunity, the
16 debtor has to proceed in this manner. However, if the
17 State refuses to waive its sovereign immunity by appearing
18 in the proceeding, the debt will be automatically
19 discharged. You -- you would have no problem with that, I
20 take it.

21 MR. BRAND: I'm not -- I'm not certain that that
22 would not be the same type of statute that I -- I objected
23 to a moment ago.

24 QUESTION: No. I thought you accepted that a
25 moment ago. I thought you accepted a moment ago that

1 Congress didn't have to provide this special treatment of
2 the States at all. If Congress didn't have to provide it
3 at all, certainly Congress could say if the State chooses
4 not to -- not to take it, not to appear in the proceeding,
5 we'll dispense with it. I -- it seems to me the greater
6 includes the lesser.

7 MR. BRAND: Well, I -- I agreed, Your Honor, and
8 I still agree that -- that Congress could fashion a
9 statute that would make student loans dischargeable in the
10 same manner as -- as any other debt. And in -- in that
11 case, it -- it would take place the same as any other
12 debt. And of course, if -- if the State were to waive its
13 sovereign immunity and enter into a bankruptcy proceeding
14 and -- and voluntarily participate, then -- then it could
15 do and -- and the court could act accordingly without any
16 special enabling legislation by Congress.

17 QUESTION: I -- I don't understand what the
18 statute has -- how the statute is involved in this. I
19 mean, the statute just sets a standard for discharging a
20 -- a student who has an educational loan. It says it has
21 to be undue hardship. What's wrong with that? I mean,
22 why can't -- there are dozens of statutes -- dozens of
23 statutes that say -- I guess dozens. I'm not a bankruptcy
24 expert, but statutes that say you get this kind of a
25 discharge if there hasn't been a fraudulent conveyance,

1 but if there has been, you don't get it, and if it's this,
2 you don't get it, and if it's that, you do get it. All
3 these may involve debts owed to or -- the State. Are --
4 are you saying -- what has the statute to do with this?
5 The statute just sets a standard for getting a discharge.

6 MR. BRAND: Well, Your Honor, I -- I believe
7 that this statute -- this particular subsection affecting
8 student loan discharge is really unique within the
9 exceptions to discharge.

10 QUESTION: All right. Let's assume it's unique.

11 MR. BRAND: There --

12 QUESTION: What is it in the Constitution or the
13 Eleventh Amendment that says Congress cannot set a special
14 standard for discharging a bankrupt from a certain kind of
15 debt?

16 MR. BRAND: Congress --

17 QUESTION: What -- what in -- what in the
18 Constitution says that if that kind of debt happens to be
19 one that is owed to the State, Congress is forbidden to do
20 that? I don't -- I just don't understand it.

21 MR. BRAND: Your Honor, we -- we do not dispute
22 that Congress has the power to set a separate standard for
23 this type of debt --

24 QUESTION: I know and so why is the State, if it
25 happens to be owed that kind of money, in any sort of a

1 different position?

2 MR. BRAND: Well, the -- the question is not the
3 effectiveness of the congressional determination regarding
4 how to handle that debt, but rather the constitutionality
5 of the means by which Congress --

6 QUESTION: Now, then what you're quarreling with
7 is, of course, not the statute. You are quarreling, as
8 Justice Ginsburg pointed out, with a bankruptcy rule that
9 happen to use the word adversary proceeding. But suppose
10 the rulemakers had simply said, this need not be done in
11 an adversary proceeding. It can be done in exactly the
12 same kind of proceeding as discharging any other kind of
13 debt. I, the bankruptcy judge, will follow the
14 congressional mandate as to when it is discharged. You
15 will notify all debtors, Mr. Bankrupt, including the
16 State, and if they want to come in and protest it, they
17 can. Now, why -- what would be unconstitutional about
18 such a provision that never uses the word adversary
19 proceeding?

20 MR. BRAND: Well, Your Honor, our objection is
21 not merely to the bankruptcy rules. I would -- I would
22 repeat that -- that --

23 QUESTION: I read your position to be that the
24 State isn't bound at all, for instance, that the
25 bankruptcy court cannot discharge property liens held by

1 the State. I mean, I -- I read your position as being
2 that the State cannot be forced into any aspect of the
3 bankruptcy proceeding.

4 QUESTION: And so did I.

5 QUESTION: I guess -- I guess the -- you would
6 say the State doesn't have to abide by the automatic stay.

7 MR. BRAND: Oh, certainly not, Your Honor.
8 Certainly not. And I thought that we were clear in our
9 briefing that we -- we recognize that the -- the State
10 would be bound by the automatic stay because it's
11 automatic. It is by operation of law and by operation of
12 the Supremacy Clause --

13 QUESTION: I'd rather like to get the answer to
14 the question which is I understand what position you took
15 in the brief. I want to know why. I want to know what
16 the logic is. I can't find anything in the Constitution
17 that says that Congress cannot impose the same standard in
18 respect to discharging a debt owed to the State as it
19 applies to a debt owed to anybody else. Now, either you
20 agree with that proposition or you don't. And if you
21 don't -- and I think you don't -- I'd like to know what
22 the theory is.

23 MR. BRAND: Your Honor, I agree that Congress
24 can make those distinctions. I --

25 QUESTION: Fine. Once you agree with the

1 proposition, then all your objecting to is the word
2 adversary in the word adversary proceeding, and it takes 3
3 minutes or less for a good expert simply to get rid of
4 that adversary proceeding and have the same thing done in
5 an ordinary proceeding.

6 Now, I want to know the answer to what I say,
7 not that you disagree with it. I know you disagree with
8 it. I want to know why you disagree with it.

9 MR. BRAND: I disagree with it because the --
10 the legislative reports as to that subsection, section
11 5239(a)(8), strongly point out that the statute -- that
12 that subsection is intended to be self-executing and that
13 the creditor, the lender, the guarantor, the -- the
14 guarantee institution, are not required to initiate action
15 but instead can rely on the nondischarge, on the exception
16 from discharge.

17 So by -- by structuring the -- the exception
18 that way, we would submit that Congress, as this Court has
19 recognized in other situations, has given elevated status
20 to that creditor's position, has recognized that creditors
21 of those kinds of debts have interests in the payment of
22 those debts that outweigh the normal fresh-start policy
23 that -- that underlies bankruptcy. So our position is
24 that it does turn on the nature of the statute and not
25 merely those bankruptcy rules that require --

1 QUESTION: The statute -- the statute doesn't --
2 doesn't require, does it, that that preferred position be
3 established in an adversary proceeding?

4 MR. BRAND: Certainly not by express terms, Your
5 Honor, but -- but again, the rules -- rules made
6 consistent with that statute, together with that
7 legislative purpose, would certainly indicate that --
8 that --

9 QUESTION: And I suppose you're saying this is
10 an adversary proceeding. Regardless of whether --

11 MR. BRAND: Oh --

12 QUESTION: -- regardless of how -- how it got to
13 be so, whether it got to be so through rule or through
14 anything else, it's an adversary proceeding and the State
15 cannot be hailed in in this fashion.

16 MR. BRAND: That's exactly right, Your Honor.
17 There's no dispute about that. I mean, this --

18 QUESTION: No, but there is a dispute about
19 whether you could, in fact, call this kind of adversary
20 proceeding, given the underlying standard that all it is
21 is a way of getting to the same result, really not an
22 adversary proceeding for purposes of the Eleventh
23 Amendment, since it has no functional difference
24 whatsoever from a proceeding that isn't labeled adversary
25 but simply gives the State notice of what's going on and

1 permits the State to come in, just as if it worked, which
2 is ordinary proceedings.

3 MR. BRAND: Except that ordinary proceedings in
4 bankruptcy, as I mentioned earlier, do not involve the
5 individualized adjudication of debts. They involve other
6 issues. They involve martialing the assets. They involve
7 assessing the --

8 QUESTION: That's a good answer.

9 QUESTION: Mr. Brand, can I ask you --

10 QUESTION: Now, what about --

11 QUESTION: May I ask one question? Did I
12 understand you correctly to say that you did not contest
13 the fact that if -- if -- that if they had a blanket rule
14 that all student loans are automatically dischargeable,
15 that would be true even if the creditor was a State?

16 MR. BRAND: Certainly, Your Honor, and the --

17 QUESTION: And does that mean you also would
18 agree that any ordinary commercial obligation to the State
19 such as paying rent for an -- an office suite or something
20 like that could also be dischargeable and there would be
21 no sovereign immunity problem there?

22 MR. BRAND: Yes, Your Honor, and the reason --
23 the reason I agree to that is because that does not
24 require an adjudication. It -- it would occur by
25 operation of law by which --

1 QUESTION: Well, but there has to be -- there
2 has to be a final order in the bankruptcy proceeding
3 discharging -- you know, giving the -- the debtor a
4 discharge.

5 MR. BRAND: But we would submit in a -- in a
6 very real sense that would be surplusage.

7 QUESTION: But the -- but the net result is I
8 thought your position in your brief was somewhat different
9 from that. That's why I wanted to be sure about it. You
10 do agree that -- that the sovereign immunity is not a
11 valid objection to a discharge of a bankrupt estate.

12 MR. BRAND: That's -- that's right when the
13 discharge is by operation of law. And again, I would
14 analogize to the -- the situation of the automatic stay
15 provision that -- that Justice O'Connor raised. Again,
16 that operates automatically when the --

17 QUESTION: So, but the difference in the
18 automatic stay if the -- if the debtor had to go in and
19 prove his name, serial number, and rank or something
20 first, so it wasn't completely automatic, then you would
21 say you have a sovereign immunity objection.

22 MR. BRAND: Possibly, possibly not. Again, I
23 would submit that there's authority from lower courts that
24 would -- would possibly --

25 QUESTION: Well, I'm really not so much

1 interested in the authority from the lower courts as I am
2 curious about your position. What exactly does the
3 sovereign immunity defense protect for you?

4 MR. BRAND: In this case the sovereign immunity
5 defense protects the State from being made a defendant and
6 from having compulsory process issued against it to appear
7 in a bankruptcy court that could be in any State of the
8 union in this case.

9 Now, the -- the reason I was referring to
10 authority from other courts is to -- is to remind the
11 Court that all of the courts that have -- that have made
12 the type of holding that Your Honor is referring to have
13 also recognized the applicability of Eleventh Amendment
14 immunity in adversary settings.

15 QUESTION: I know, but it seems to me somewhat
16 anomalous to say that if you want to do it without giving
17 us a hearing, you can go ahead and do it, but if you give
18 us notice and a hearing and an opportunity to respond,
19 then you're protected by the Eleventh Amendment.

20 MR. BRAND: Well, again --

21 QUESTION: A rather strange position.

22 MR. BRAND: -- again, Your Honor, I think -- I
23 think we're talking about very different things there.
24 There is -- there is quite a difference between the
25 general discharge, which again occurs without

1 individualized adjudication of -- of debts -- that is --
2 that is a distinct thing under the bankruptcy laws from a
3 situation in -- in which there's a proceeding involving
4 the dischargeability of a particular debt --

5 QUESTION: Well, you say --

6 MR. BRAND: -- such as we have here.

7 QUESTION: -- it could well be that the State
8 filed a claim and proved up its claim and then there's not
9 enough money to pay it, the claim, but there would be some
10 kind of proceeding to establish the claim. Would that be
11 different then?

12 MR. BRAND: Well, in -- in a case where the
13 State had filed a claim, the State would have voluntarily
14 appeared in the -- in the proceeding as relates to the
15 subject matter of that claim. So there would not be any
16 sovereign immunity situation there at all.

17 QUESTION: So that if the State voluntarily
18 appears, it would automatically waive its sovereign
19 immunity defense.

20 MR. BRAND: As to that claim, yes.

21 QUESTION: Well, that's the Gardner case, isn't
22 it? The --

23 MR. BRAND: Yes, I believe so. Yes, Gardner v.
24 New Jersey.

25 QUESTION: Tell me how bankruptcy works. Is the

1 United States trustee potentially part of any proceeding
2 that the trustee wants to be involved in? Can the trustee
3 have come into this proceeding voluntarily if -- if he or
4 she chose?

5 MR. BRAND: I -- I believe so, Your Honor, but
6 I'm not certain if that is applicable in every -- in every
7 district. And I'm not -- I apologize. I'm not certain as
8 to that. I know the U.S. trustees have -- have those
9 powers and responsibilities in at least -- at least a good
10 number of bankruptcy --

11 QUESTION: Because it does seem that if an
12 action is brought by a U.S. trustee, that's an officer --
13 that's the Federal Government.

14 MR. BRAND: Well, certainly that would be a
15 different situation and certainly the State --

16 QUESTION: Which is another way of solving this
17 problem

18 MR. BRAND: That's right, Your Honor. That's --
19 that's conceivable. Certainly the State would have no
20 sovereign immunity from -- from an action by the United
21 States.

22 QUESTION: In -- in a world of limited
23 resources, especially for the U.S. trustee -- this is a
24 no-asset bankruptcy. If the U.S. trustee is going to come
25 into each one of these proceedings, it might be rather

1 impractical.

2 I was curious about the credit -- the creditor
3 class for these student loans. It's not just States that
4 are creditors when a student tries to get out from under
5 the student's debts. What -- what other entities would be
6 in this situation, not with respect to sovereign immunity,
7 but as someone who has loaned money to a student?

8 MR. BRAND: Well, certainly any lending
9 institution could -- could be involved as a -- as a
10 creditor in a student loan. The -- the Federal and -- and
11 I guess there are State programs as well, but involve
12 fairly complicated relationships between lending
13 institutions and secondary holders and guarantors at -- at
14 various levels.

15 QUESTION: Do you know what part of the business
16 the States have, to what extent, compared to other
17 creditors, other lenders?

18 MR. BRAND: Well, the -- I -- I can speak for
19 the State of Tennessee. The State of Tennessee is
20 involved as a guarantor, not as a lender, but merely as a
21 guarantor in conjunction mainly with these -- these
22 Federal loan programs. And the -- the State of Tennessee
23 is participating not as a -- a business actor, but as a
24 means of -- of pursuing the public policy of making it
25 simpler and easier for Tennessee residents to obtain a

1 college education. So the -- the State as a guarantor is
2 -- is not in this -- in the position at all of an ordinary
3 creditor, really, as far as its -- as far as its purpose
4 and -- and even as far as its -- probably its financial
5 calculations in -- in how to deal with that. Again, it's
6 -- it's a matter of pursuing the public policy of making
7 it easier for -- for the students, for these debtors to
8 obtain their college education.

9 QUESTION: So for -- for the primary lender,
10 this procedure would be fine. The -- so the debt wouldn't
11 be dischargeable to the initial creditor, the one who
12 loans --

13 MR. BRAND: I -- I believe -- I believe, Your
14 Honor, certainly the -- the initial creditor could
15 certainly be involved, would have no sovereign immunity
16 defense. There would still be the requirement of the
17 undue hardship showing.

18 QUESTION: But if you -- if you -- Congress was
19 to say, well, too bad, we tried to give them a break, we
20 can't do it, so we're going to make them dischargeable
21 just like any other debt, that would have a very adverse
22 effect on all the other creditors in the picture who are
23 not State actors.

24 MR. BRAND: It certainly would, Your Honor, but
25 it also could create complications as far as -- as far as

1 whether States would choose to participate in -- in
2 student loan programs. Again, it's a policy determination
3 made State by State. There's no requirement that the
4 States participate in -- in such programs.

5 It -- it's part of the balancing of those
6 interests I think that has resulted in this statute and in
7 this statute being written the way it is. At one point in
8 time not too long ago, student loans were discharged in an
9 ordinary bankruptcy, and then it was -- it was cut back to
10 only loans that had been in -- in payment more than --
11 more than 5 -- more than 7 years and more than 5 years,
12 and now, of course, it's cut back all the way to where
13 it's only subject to discharge upon a showing of undue
14 hardship. So there's -- there's definitely a policy of
15 wanting to make student loan repayment more certain and
16 make that a -- a different relationship from other
17 debtor/creditor relationships.

18 If there are no further questions from the Court
19 at this time, I would like to reserve the remainder of our
20 time. I would ask that the judgment of the Sixth Circuit
21 be reversed.

22 QUESTION: Very well, Mr. Brand.

23 Mr. Gerson, we'll hear from you.

24 ORAL ARGUMENT OF LEONARD H. GERSON

25 ON BEHALF OF THE RESPONDENT

1 MR. GERSON: Mr. Chief Justice, and may it
2 please the Court:

3 The questioning of the petitioner reflected the
4 fact that there is an inherent conflict between the
5 requirements of the operation of the bankruptcy system and
6 the State's sovereign immunity. This conflict has been
7 recognized in this Court's past opinions. For example, in
8 Van Huffel v. Harkelrode, a 1931 decision of this Court,
9 it was claimed that the sale of a debtor's property free
10 and clear of -- of the State's tax lien was not effective
11 but the State lacked jurisdiction. This --

12 QUESTION: The State lacked?

13 MR. GERSON: Jurisdiction over the --

14 QUESTION: The State lacked?

15 QUESTION: The Supreme Court.

16 MR. GERSON: I'm -- I'm sorry, Your Honor. The
17 Court lacked jurisdiction over the State. And this Court
18 denied that -- the State's position.

19 Subsequent to that in Gardner/New Jersey, which
20 is a case that -- that which is noted for waiver, the
21 State also took the position that not -- that the property
22 that was a part of the debtor's estate was limited to the
23 debtor's equity and did not include that portion of the
24 property of the debtor that was subject to the State's tax
25 lien. Again, this Court said, no, all property of the

1 debtor is part of the estate, including that part that's
2 subject to a State's tax lien.

3 QUESTION: Of course, in that case the State had
4 come into bankruptcy -- the bankruptcy court voluntarily.

5 MR. GERSON: That's correct, Your Honor. But
6 the opinion -- that portion of the opinion in Gardner that
7 addresses that issue does not rely upon the fact that the
8 State filed a proof of claim

9 QUESTION: If -- if we were to analogize
10 bankruptcy proceedings to in rem proceedings in general,
11 nevertheless this dischargeability proceeding is set up
12 under the rules as an adversary one where a notice and a
13 summons is filed on the State. That's a product of how
14 the rules are constructed. Now, presumably in time they
15 could be changed, but what about this case?

16 MR. GERSON: To allow this case to be determined
17 on the basis that an adversary proceeding had been filed
18 would be elevating form over substance because the
19 jurisdiction of the court with respect to the claim arises
20 from the court's jurisdiction over the property of the
21 estate and claims made against it and the -- and the
22 debtor. They're all part of the res. So the filing of an
23 adversary proceeding was merely a manner -- merely
24 allowing the State to -- to be provided with an elevated
25 form of notice rather than being jurisdictional.

1 In addition, 28 U.S.C. 2075 states that the
2 rules, bankruptcy rules, should not in any way abridge or
3 modify the substantive rights that are granted under the
4 code, and I believe in these circumstances to allow this
5 decision to be based upon the fact that an adversary
6 proceeding had been filed would have the effect of
7 abridging Ms. Hood's rights --

8 QUESTION: Well --

9 MR. GERSON: -- by denying here an opportunity
10 for hardship.

11 QUESTION: What happens when you don't show up
12 in an adversary proceeding?

13 MR. GERSON: A default judgment is entered.

14 QUESTION: A default judgment.

15 MR. GERSON: Yes.

16 QUESTION: So how can you say -- I mean, had it
17 not been set up this way, I would assume that the
18 bankruptcy judge would have to make his or her own
19 determination about whether the condition of the statute
20 had been met, but once you have this adversary system set
21 up, I assume the bankruptcy judge is entirely within his
22 or her rights by just saying, hey, the State hasn't shown
23 up, the State loses.

24 MR. GERSON: I would -- I'd like --

25 QUESTION: Now, that -- that doesn't seem to me

1 to be elevating form over substance. That -- that's a big
2 difference.

3 MR. GERSON: Yes, and I -- I believe I
4 incorrectly stated what would happen, Your Honor. It's --
5 even -- even in an adversary proceeding, the court would
6 still have to find that Ms. Hood had demonstrated a right
7 to a -- to an undue hardship discharge.

8 QUESTION: So it wouldn't just go by default
9 then if the State didn't show up?

10 MR. GERSON: That's correct, Your Honor.

11 QUESTION: Do you know any other adversary
12 proceedings that work that way? I mean, I suppose that
13 depends on what the -- what the rule means, but when the
14 rule describes it as an adversary proceeding, I -- I would
15 take it to mean that if the other side doesn't show up, it
16 loses.

17 QUESTION: Well, in a -- in a -- in an ordinary
18 suit for money judgment, if the defendant fails to show
19 up, he can be defaulted as to liability, but he still has
20 to show the money damages. He just doesn't get the amount
21 that he says in his complaint.

22 MR. GERSON: That's correct, Mr. Chief Justice.

23 QUESTION: Well, is -- is the amount at issue
24 here?

25 MR. GERSON: The amount is at issue only to the

1 extent that in order to show undue hardship, Ms. Hood has
2 to demonstrate that she can't repay it.

3 QUESTION: Yes, but the -- but the -- the
4 amount, how much it is, is not -- is not in controversy,
5 is it?

6 MR. GERSON: No, it's not.

7 QUESTION: I thought --

8 QUESTION: So what is the situation there? I
9 mean, I don't want you just to drop this. That is, is an
10 adversary proceeding under the Bankruptcy Code -- and
11 there are quite a few. You've said two opposite things
12 now. Your first time you said, well, if the other party
13 doesn't show up, the bankruptcy judge can just say,
14 debtor, you win. Okay? Without looking at the merits.
15 And the second time you said, no, that's not really so.
16 The bankruptcy judge has to satisfy himself that the
17 statutory standard is met.

18 Now, I guess this isn't the only place where
19 there's a adversary proceeding in the code. So which is
20 it? Is it like an -- and how do I find out? If you're
21 uncertain, what do I look up to try to find out the answer
22 to that question?

23 MR. GERSON: Well, Justice Breyer, very often
24 adversary proceedings are commenced in bankruptcy court
25 and they're necessary when the kind of action that dispute

1 -- in dispute is the equivalent of an action that could
2 have been commenced prior to the establishment of the
3 bankruptcy. It's just --

4 QUESTION: Yes, I --

5 MR. GERSON: -- prior, you know, action now
6 brought into the bankruptcy court. And then the
7 bankruptcy court could issue a default judgment because --

8 QUESTION: No, I got that.

9 MR. GERSON: -- it would be a traditional
10 action.

11 QUESTION: So maybe there are no others. Are
12 there -- are there any adversary proceedings, other than
13 this, one which isn't like what you just described?

14 QUESTION: Well, certainly an action by a
15 trustee for -- of voidable preference would be quite
16 different, would it not?

17 MR. GERSON: With respect to a voidable
18 preference, if -- if the defendant did not demonstrate it
19 had any defense, a judgment would be issued in favor of
20 the -- the State because there is a presumption for a
21 voidable preference once certain factors are met.

22 QUESTION: And there you're getting money from
23 outside the estate too. You're getting a money judgment
24 against somebody that would increase the assets of the
25 estate.

1 MR. GERSON: That's correct, Your Honor, but it
2 is not Ms. Hood's position in this case that a preference
3 action would fall within the traditional in rem
4 jurisdiction of a bankruptcy court and thus the State
5 sovereign immunity would be abrogated.

6 QUESTION: So you would -- you would say that if
7 the -- if there were a suit for a voidable preference
8 against the State, the ELEVENTH Amendment rule would
9 prevail?

10 MR. GERSON: I -- that issue is unclear, Your
11 Honor. It's certainly not Ms. Hood's position that the
12 ELEVENTH Amendment would not prevail. And there's
13 actually a case pending before this Court right now,
14 Massachusetts v. H. J. Wilson, where at issue is the
15 debtor's demand for an income tax refund. So the
16 opportunity to visit the issue of affirmative money relief
17 against a State and its -- and the ramifications of the
18 Eleventh Amendment can be addressed in that case. It's --

19 QUESTION: We're trying to get -- I'm trying to
20 get the answer still to Justice Scalia's question. Take
21 the question the Chief Justice asked. It's a preference
22 action. It's a kind of bankruptcy action. It's in an
23 adversary proceeding. Is that right?

24 MR. GERSON: Yes.

25 QUESTION: Okay. Now, the other side doesn't

1 show up. Okay, forget this Eleventh Amendment business.
2 I just want to know the normal thing in bankruptcy.
3 What's the answer? If he doesn't show up, is he defaulted
4 like a regular case outside the court, or does the trustee
5 -- I mean, does the judge, the bankruptcy judge, look at
6 the matter and make up his own mind independently about
7 whether it was a preference or not? How does it work in
8 bankruptcy?

9 MR. GERSON: It would -- it would not be a
10 default judgment, Your Honor. It would be a judgment on
11 the merits.

12 QUESTION: I have one other technical question.
13 Suppose we were to say --

14 QUESTION: Excuse me. I didn't understand that
15 answer. It would not be a default judgment. It would be
16 a judgment on the merits. Is there a distinction?

17 MR. GERSON: It would be a judgment --

18 QUESTION: I thought default judgments are, for
19 all purposes, considered judgments on the merits. For
20 what purpose is a default judgment not a judgment on the
21 merits?

22 MR. GERSON: Oh, to -- to the extent it is --
23 there's greater flexibility of a defendant to come back
24 and ask for reconsideration, I believe, under normal
25 procedures.

1 QUESTION: That doesn't make it not a decision
2 on the merits. It may be subject to reopening, but a
3 default judgment is a judgment.

4 MR. GERSON: That's correct.

5 QUESTION: I thought that the question we -- we
6 were talking about before -- that there was a clear and
7 certain answer to the question, that -- that if the claim
8 is made that there's undue hardship, even if the State
9 doesn't show up -- well, let's take the -- because this is
10 written for all creditors and not particularly with States
11 in mind. If the creditor doesn't show up, the bankruptcy
12 judge still has to find that there's undue hardship in
13 order to make this dischargeable.

14 MR. GERSON: That's correct, Justice Ginsburg.

15 QUESTION: And where does that come from? I --
16 that was my understanding about the way it works, but is
17 that a statute, a rule? Where does -- where does that
18 come from?

19 MR. GERSON: I think it comes from the natural
20 reading of the statute that such a finding has to be made
21 that there would be an undue hardship for the debtor to
22 have to repay that -- that loan.

23 QUESTION: You -- you could say the same about
24 any default judgment in a case -- in a tort action where
25 the tort statute, you know, only imposes liability where

1 the defendant has been negligent. The defendant doesn't
2 show up. The court doesn't -- doesn't enter into its own
3 independent inquiry as to whether the defendant was
4 negligent. It enters default judgment. And the statute,
5 just as clearly, requires negligence there as this statute
6 requires undue hardship here.

7 MR. GERSON: The difference -- the difference is
8 -- Your Honor, is that all of the property of a debtor and
9 claims against that property -- they're -- they're all
10 under the bankruptcy court's jurisdiction. So a
11 bankruptcy court has a special obligation to -- to protect
12 the interests of all creditors and the estate, and I
13 believe because of that, it would have a heightened
14 responsibility to determine whether there was a basis for
15 an undue hardship discharge because the decision is not
16 solely -- is -- is affecting everyone.

17 QUESTION: In the voidable preference case, it's
18 -- it's as if we're -- the suggestion is is that the
19 bankruptcy court has the authority to order the res
20 brought before it, commanding the State to deliver the
21 res, i.e., the voidable preference.

22 MR. GERSON: I -- there is a question that --

23 QUESTION: And -- please.

24 MR. GERSON: -- with -- with regard to a
25 voidable preference action whether the funds the debtor

1 would be seeking would be part of the res because it's not
2 in the possession of the estate.

3 QUESTION: Right.

4 MR. GERSON: And certainly that distinction can
5 be made as made in California v. -- v. Deep Sea Research,
6 that if the property is in the possession of the -- of the
7 State, rather than the debtor, a different result is
8 required with respect to the Eleventh Amendment.

9 QUESTION: Well, before the Bankruptcy Act in
10 1978, bankruptcy courts couldn't try voidable preferences.
11 That had to be in the district court I believe.

12 MR. GERSON: That's correct, Justice Rehnquist.

13 QUESTION: If in fact we assume -- let's suppose
14 when we look into this -- suppose I was to come to the
15 conclusion that an adversary proceeding in bankruptcy is
16 identical to a case that has nothing to do with bankruptcy
17 in a court. You say isn't, and maybe that's so and we'll
18 find out. All right.

19 Now, if that were so and if that meant under the
20 Court's case law that this particular adversary proceeding
21 were invalid under the Eleventh Amendment, would the
22 bankruptcy judge under section 105 or some other section
23 or would the Rules Committee have the power without going
24 back to Congress to devise a different procedure that
25 would get to exactly the same place, say, a procedure that

1 had the bankruptcy judge adjudicate this under the same
2 standard while notifying the State, like any other
3 creditor, that it could intervene at its choice.

4 MR. GERSON: Yes, it could, Your Honor. And --
5 and the basis for that would be to reconciling the
6 requirements of 28 U.S.C. 2075 and the requirement for the
7 bankruptcy rules because under 105, a court could rule
8 that it would be inappropriate to enforce the requirement
9 of Bankruptcy Rule 7001, which requires an adversary
10 proceeding. So 105 would give a bankruptcy court that
11 power and I believe it would be an appropriate exercise of
12 that power.

13 QUESTION: And even without 105, could the Rules
14 Committee then devise a different rule?

15 MR. GERSON: Certainly, Your Honor.

16 QUESTION: Mr. Gerson, you -- your position
17 depends heavily on the characterization of bankruptcy
18 proceedings as in rem, and one can understand that about
19 the bankrupt estate, it collects whatever assets there are
20 and distributes them. But this is a no-asset bankruptcy.
21 So how does the in rem characterization fit a case where
22 there are no assets?

23 MR. GERSON: Because the debtor itself, at least
24 the pre-petition debtor, is also considered part of the
25 res, part of the bankruptcy court's in rem jurisdiction.

1 That was reflected in Hanover National Bank v. Moyses
2 where the creditor complained that its debt had been
3 discharged, but it had never received -- no summons or
4 complaint had ever been filed. In fact, it complained it
5 had never received notice. And this Court's response was,
6 no, bankruptcy is a form of in rem jurisdiction, and on
7 that basis the -- the claim of that creditor could be
8 discharged even though no adversary -- no summons and
9 complaint was filed. Notice as a motion was sufficient,
10 and it based --

11 QUESTION: So what you're saying is the -- is
12 the debtor is not a thing, is not a res, but a debtor --
13 this is an adjudication over a status which traditionally
14 is also in rem

15 MR. GERSON: That's correct, Your Honor. I know
16 it doesn't entirely fit our traditional notions of what a
17 res is, but it's consistent with how this Court has
18 traditionally understood the in rem jurisdiction of a
19 bankruptcy court and the needs of a bankruptcy court to
20 satisfy its essential functions.

21 The kinds of contradictions that are being
22 raised in the questioning are reflective of what's
23 happened in the circuit courts of appeal where the Fourth
24 Circuit, the Fifth Circuit, the Ninth Circuit all have
25 recognized and have stated in -- in earlier opinions that

1 the Seminole Tribe doctrine applied in bankruptcy but
2 later recognized an in rem exception to allow for the
3 discharge of debts with respect to the Fifth Circuit and
4 the Ninth Circuit and -- and the Fourth Circuit, and the
5 Fourth Circuit also recognized that principle with respect
6 to the confirmation of a plan and its binding effect upon
7 a State. So right now bankruptcy law is in an
8 inconsistent muddle with respect to the applicability of
9 the Eleventh Amendment, and this case allows this Court an
10 opportunity to reconcile that inconsistency as --

11 QUESTION: Only a small piece of it, according
12 to what you told us earlier, because you said this doesn't
13 involve the preference question.

14 MR. GERSON: That's -- that's correct, Your
15 Honor. Of course, this Court could rule that given the
16 traditional in rem nature of a bankruptcy and the fact
17 that, particularly under the Bankruptcy Act a preference,
18 as Chief Justice Rehnquist pointed out, was not part of
19 the bankruptcy summary jurisdiction but required a plenary
20 action, that in fact actions requiring any affirmative
21 monetary relief against a State are not part of a debtor's
22 -- are not part of a bankruptcy court's in rem
23 jurisdiction, if it chose.

24 If there are no more questions, thank you.

25 QUESTION: Thank you, Mr. Gerson.

1 Mr. Brand, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF DARYL J. BRAND

3 ON BEHALF OF THE PETITIONER

4 MR. BRAND: Thank you, Your Honor. Mr. Chief
5 Justice, and may it please the Court:

6 The State's position in this case is that a
7 proceeding under the law which requires the State to make
8 a choice between voluntarily entering the proceeding or
9 sitting back and suffering a loss of its -- of its rights
10 is every bit as coercive whether it's styled as a motion
11 or an adversary proceeding or -- or anything else, is
12 every bit as coercive as a lawsuit similar to the -- the
13 situation with the administrative proceedings in the
14 Federal Maritime Commission case.

15 QUESTION: Is that loss of its right automatic?
16 What is your answer to the question of whether, if you
17 don't show up, a default judgment is entered automatically
18 against you, or does the bankruptcy judge have to make the
19 assessment of whether there's an undue hardship?

20 MR. BRAND: I am not certain, Your Honor, but I
21 believe that an undue hardship showing would still be
22 necessary.

23 But in either -- in either situation, the State
24 would suffer the consequences of losing its rights subject
25 to an adjudication, not subject to the mere operation of

1 law as with the general discharge at the conclusion of a
2 -- of an ordinary bankruptcy proceeding.

3 As -- as far as the preference actions go, this
4 case -- I'm sorry -- this Court decided in Hoffman v.
5 Connecticut which involved a preference action and even
6 more than that, a turnover action where there actually was
7 property of the estate that the -- that the bankrupt
8 trustee was -- was entitled to recover, that in either of
9 those types of situations, the Eleventh Amendment applied.
10 Now, of course, that case turned on whether Congress had
11 -- had made a clear statement in the statute, but in any
12 event, the Court, having found that the -- that the
13 Congress did not make a clear statement of intent to
14 override sovereign immunity, applied the Eleventh
15 Amendment to that preference action, that turnover action
16 in that case.

17 Now, in this case we have no property. The --
18 the debtor is not seeking to -- to get property. The --
19 the creditor is not seeking to make a claim out of the
20 property of the estate. So we would submit that -- that
21 the Court can decide this case, which involves a simple
22 adversary proceeding on its face, the issuance of
23 compulsory process without even reaching the question of
24 whether a similar effect would -- would occur in -- in a
25 preference action or in any other type of bankruptcy

1 action.

2 So I'd like to emphasize to the Court that this
3 is an unusual statute, and the question in this case is,
4 does the Eleventh Amendment apply in the bankruptcy
5 context? But the precise circumstances of this case can
6 well limit a court's holding to the question of whether
7 sovereign immunity protects the State in an adversary
8 proceeding on this particular type of statute for a
9 particular exception from discharge.

10 If there are no further questions --

11 QUESTION: I do have. Would you tell me again,
12 what -- what's the cite to the case about the turnover
13 that you just cited?

14 MR. BRAND: It's --

15 QUESTION: What is the name of the case?

16 MR. BRAND: It's Hoffman v. Connecticut.

17 QUESTION: Hoffman, thank you.

18 MR. BRAND: It's a 1989 case --

19 QUESTION: Right.

20 MR. BRAND: -- in which -- in which the -- the
21 plurality of the Court found that Congress had not made a
22 clear statement of intent to override sovereign immunity,
23 but in which two Justices found that in any event Congress
24 had no constitutional authority to override Eleventh
25 Amendment immunity in such a setting.

1 If there are no further questions, again we --

2 QUESTION: Yes, I had one. And it was in --
3 your brief said, well, it's not that the bankruptcy law
4 doesn't find the States so that, for example, if the State
5 as creditor would sue the student after she's been
6 discharged in bankruptcy, she could then as a defense say,
7 I'm not liable on this debt. It's been discharged. I got
8 the undue hardship finding from the bankruptcy court.
9 That -- you did say that in your brief that that would be
10 -- that -- that she could have this as a defense.

11 MR. BRAND: Well, we -- we did not mean that she
12 would have obtained the undue hardship finding from the --
13 the bankruptcy court, but that she could raise the issue
14 of undue hardship in whatever State proceeding was
15 initiated by the State.

16 QUESTION: Why would the State ever initiate
17 such a proceeding when it has much easier -- it can
18 garnish wages. It can intercept tax refunds.

19 MR. BRAND: Your Honor, may I answer the
20 question?

21 QUESTION: Yes, briefly.

22 MR. BRAND: The answer is, as Your Honor
23 suggests, the primary -- the primary means under the
24 student loan program would be through wage garnishments
25 and through tax intercepts, but the Federal regulations

1 and State law would afford the debtor opportunity for
2 administrative proceedings to raise the undue hardship
3 issue and prove that she should be absolved from the
4 student loan debt. So there are State remedies available
5 in the context not of a State court --

6 QUESTION: Thank -- thank you, Mr. Brand.

7 MR. BRAND: Thank you, Your Honor.

8 CHIEF JUSTICE REHNQUIST: The case is submitted.

9 (Whereupon, at 10:52 a.m., the case in the
10 above-entitled matter was submitted.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25